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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1435

THE ENVIRONMENTAL PROTECTION AGENCY, et al.,
Petitioners,

v.

PEOPLE OF THE STATE OF CALIFORNIA ex rel. STATE WATER RESOURCES CONTROL BOARD and STATE OF WASHINGTON, et al.,
Respondents.

Joint Memorandum of Respondents California and Washington in Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

Page

Joint Memorandum of Respondents California and Washington 1

1. Similarities of the Air and Water Acts 5

2. Dissimilarities of the Air and Water Acts 7

Conclusion 11

TABLE OF AUTHORITIES CITED

Cases	Pages
California v. Stastny, 382 F.Supp. 222 (C.D. Cal.), appeal pending, No. 72-2905 (9th Cir.)	4
Kentucky v. Ruckelhaus, 497 F.2d 1172 (6th Cir. 1974), cert. granted sub. nom. Kentucky v. Train, No. 74-220 (March 17, 1975)	2, 3, 4, 5, 10, 11
State of California et al. v. Environmental Protection Agency, 511 F.2d 963 (9th Cir. 1975)	1
Statutes	
33 U.S.C.:	
§ 1251(b)	7
§§ 1251-1376	1
§ 1323	5
§ 1342(b)	9
§ 1342(c)	9
§ 1365(f)(6)	9
§ 1369(b)(1)	10
§ 1370	6, 7
42 U.S.C.:	
§ 1857(a)(3)	7
§ 1857c-5	8
§ 1857d-1	6, 7
§ 1857f	5
§ 1857h-2	10
§§ 1857-1857(1)	2
84 Stat. 107, formerly 33 U.S.C. § 1171(a)	9
Miscellaneous	
Exec. Order No. 11752, 3 C.F.R. 380 (1973)	6
H.R. Rep. No. 91-127, 91st Cong., 2d Sess. 19 (1970)	10

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JOINT MEMORANDUM OF RESPONDENTS CALIFORNIA AND WASHINGTON

This case presents the question whether federal agencies must obtain and comply with water quality control permits issued by the states under the Federal Water Pollution Control Act, Amendments of 1972 (the "water act"). 33 U.S.C. §§ 1251-1376. We believe that the decision of the Ninth Circuit below, in holding that the water act imposes such an obligation on federal agencies, is correct. See *State of California et al. v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975). On this ground, the Court should

properly deny the petition for writ of certiorari filed by the Environmental Protection Agency ("EPA").

However, we recognize that several factors, unrelated to the merits of the Ninth Circuit's decision, militate in favor of the Court granting the EPA's petition. First, the issues in this case are of national importance, since they affect each state which receives federal authorization to develop and enforce its own water quality control program under the water act.[1]

Second, and more significantly, the Court has already decided to review the decision of the Sixth Circuit in *Kentucky v. Ruckelhaus,* 497 F.2d 1172 (6th Cir. 1974), *cert. granted sub. nom. Kentucky v. Train,* No. 74-220 (March 17, 1975). That case presents the related question whether federal agencies must obtain and comply with air quality control permits issued by the states under the Clean Air Act (the "air act"). 42 U.S.C. §§ 1857-1857l. The two cases are so interrelated that it is difficult for the Court to decide one case without considering the issues raised in the other case, yet sufficiently different that the Court cannot definitively resolve the issues in one case by simply resolving the issues in the other case.

In its petition in the instant case, the EPA enumerated certain similarities between the air and water acts, and concluded that both acts "should be interpreted in a manner consistent with each other." Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit [hereinafter "Petition"], 6. According to the EPA, the acts are so substantially identical that whatever decision the Court reaches in the *Kentucky* case should be

1. Twelve states have currently received such authorization. California was the first state, and Washington the fourth, to receive such authorization.

applied in the instant case. If this conclusion were correct, the Court might be justified in withholding action on the EPA's petition until it has decided the *Kentucky* case, on the assumption that its decision in that case will resolve the issues in the instant case.

However, the EPA's position overlooks, or ignores, the fundamental differences between the air and water acts. The water act contains a number of provisions not found in the air act, which—as the Ninth Circuit noted in the instant case (511 F.2d at 973)—provide a far stronger footing for state authority under the water act than under the air act. The dissimilarities between the acts may persuade the Court to construe the states' authority under the acts differently; in that event, the Court must distinguish between the states' authority under each act on the basis of dissimilarities appearing in the acts. However, the similarities between the acts may persuade the Court to construe the states' authority under the acts harmoniously, as the EPA urges; in that event, the provisions found solely in the water act may be helpful in explaining the congressional intent behind the air act. Thus, the dissimilarities between the acts may be used as the basis for distinguishing between the states' powers under each act, or instead as the basis for construing the air act in light of provisions appearing in the water act. In either event, the Court cannot consider the acts separately, or definitively resolve the issues in the instant case by resolving the issues in the *Kentucky* case. Both acts must be analyzed simultaneously, in order to determine the extent to which they are *in pari materia.* Thus, if the Court does not expeditiously deny the EPA's petition, it should grant the petition and consider the instant case at the same time that it considers the *Kentucky* case.

The oversimplification of the EPA's analysis of the instant case is apparent from its reading of the Ninth Circuit's decision. In support of its view that the air and water acts must be construed harmoniously, the EPA asserts that the Ninth Circuit's decision, in upholding the position of the states under the water act, "is contrary to the decision of the Sixth Circuit" in the *Kentucky* case. Petition, 5. However, closer analysis indicates that the Ninth Circuit's decision was based, in large part, on those provisions of the water act not found in the air act. Accordingly, the Ninth Circuit noted that its decision "would not be inconsistent with either an affirmance or a reversal of the district court's decision in *Stastny*" (511 F.2d at 973); the *Stastny* decision arose under the air act, and reaches a result identical to that of the Sixth Circuit in the *Kentucky* case.[2] Thus, the Ninth Circuit's decision, although helpful to the states' position in the *Kentucky* case, is not inconsistent with the Sixth Circuit's decision in that case. This strengthens our view that, if the *Kentucky* decision is correct, the water and air acts are distinguishable with respect to the extent of state authority, and the two acts are thus not capable of harmonious construction.

We will now focus more closely on the similarities and dissimilarities of the air and water acts, to show the need for simultaneous judicial construction of both acts.

1. Similarities of the Air and Water Acts.

The primary issue in the *Kentucky* case involves the meaning of section 118 of the air act, which provides that

2. The *Stastny* case, decided by a lower federal court, is now pending before the Ninth Circuit. See *California v. Stastny*, 382 F.Supp. 222 (C.D. Cal.), *appeal pending*, No. 72-2905 (9th Cir.).

federal agencies "shall comply with Federal, *State*, interstate, and local *requirements* respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." 42 U.S.C. § 1857f. (Emphasis added). The primary issue in the instant case involves the meaning of section 313 of the water act, which provides that federal agencies "shall comply with Federal, *State*, interstate, and local *requirements* respecting control and abatement of pollution to the same extent that any person is subject to such requirements, *including the payment of reasonable service charges.*" 33 U.S.C. § 1323. (Emphasis added.) Thus, both cases hinge on the meaning of the word "requirements," as it appears in sections 118 and 313.

In both cases, the Administrator of the EPA has interpreted the word "requirements" as referring to state substantive requirements, not state procedural requirements. Hence, although the Administrator concedes that federal agencies must comply with substantive "standards" and "limitations" imposed by the states, he denies that such agencies must secure, or comply with, permits issued by the states.

Many common arguments are raised by the Administrator in both cases. For instance, the Administrator claims that the applicability of state permit programs to federal agencies "could result in the transfer to state governments of significant control over federal facilities." Petition 7. The states respond in both cases that the acts contain abundant safeguards against undue interference by the states with the control of federal facilities, and that the limited power which Congress gave to the states to control air and water pollution from federal facilities is a proper

exercise of the congressional power. Also, the Administrator cites the legislative history of both acts, which contains common references that federal agencies must comply with state "standards" and "limitations"; the Administrator argues that these references are synonymous with substantive requirements, and thus do not reveal a congressional intent to require federal compliance with state permit programs. The states in both cases respond that these references set forth the goals of the air and water acts, not the method by which these goals are to be attained.[3]

The states also raise many common arguments in both cases. For instance, provisions in each act distinguish between, first, a "standard" or "limitation", and second, a "requirement respecting control and abatement" of pollution, the phrase which appears in sections 313 and 118. *Compare* 42 U.S.C. § 1857d-1, *with* 33 U.S.C. § 1370. This distinction undermines the Administrator's argument that these terms are to be construed synonymously. The states in both cases further contend that it is administratively impossible for a state to develop substantive "requirements" respecting the control and abatement of pollution unless the requirements can be tailored to the exigencies of the particular activity resulting in pollution, a process that necessarily entails an administrative proceeding for the purpose of considering the nature and effect of such activity; thus, the states contend, a substantive requirement implicitly includes a procedural requirement as well. Finally, both acts provide that the "primary" responsibility for preventing pollution rests upon the states (*compare* 42 U.S.C. § 1857(a)(3), *with* 33 U.S.C. § 1251(b)), and that the states may impose more "stringent" standards than those imposed by the Administrator (*compare* 42 U.S.C. § 1857d-1, *with* 33 U.S.C. § 1370); in both cases, the states contend that these provisions vest them with responsibilities which cannot be fulfilled unless the states are authorized, through the permit process, to control pollution by federal agencies.

3. The Administrator also relies on a presidential executive order issued after the passage of the air and water acts, which requires federal agencies to comply with state "substantive standards and substantive limitations" under both acts, but not with state "administrative procedures." Exec. Order No. 11752, 3 C.F.R. 380 (1973). The states in both cases reject the executive order as a proper interpretation of the air and water acts.

2. Dissimilarities of the Air and Water Acts.

The dissimilarities of the air and water acts are more striking than the similarities, however. Section 313, after describing the obligation of federal agencies to comply with state "requirements", provides an example of such requirements by using the phrase "including the payment of reasonable service charges." This phrase is not found in section 118. The EPA asserts that the phrase only authorizes federal agencies to compensate states "for use of their sewerage systems," and does not appear in the air act because the states do not provide comparable services for air pollutants discharged from federal facilities. Petition, 7-8 n. 4. However, the Ninth Circuit disposed of this argument by noting that the phrase would be redundant under this interpretation; federal agencies are already authorized, independently of the water act, to compensate states for use of their sewage systems, if state law so requires. 511 F.2d at 969-70. Hence, the court concluded, the phrase is intended to assure that federal agencies are authorized to pay charges incident to the issuance of a permit by the

states, and thus indicates that federal agencies must seek and comply with such permits. *Ibid.*

The variation in the language of sections 313 and 118 is critical in defining the meaning of each section. If the Court upholds the EPA's view that the sections must be read harmoniously, it must then interpret the meaning of the "reasonable service charges" phrase in section 313 in order to apply that meaning to section 118. However, the Court might instead conclude that the absence of that phrase in section 118 denotes a congressional intent that the section should be construed differently from section 313, and that the former section—unlike the latter—does not require federal agencies to comply with state permit programs. Under either approach, the Court must view both sections together, in order to ascertain the proper scope and limits of each.

Moreover, the air and water acts are fundamentally different with respect to the programs which the states are authorized to adopt, a fact which may critically bear on the kinds of "requirements" applicable to federal agencies under each act. The EPA asserts that both acts authorize the states to submit a "plan" for the abatement of pollution, and that the acts are "substantially identical" in this respect. Petition, 5-6. However, this assertion is misleading, for the acts are fundamentally different in this respect.

The air act authorizes the states to adopt an implementation "plan" to achieve the ambient air quality standards set by the Administrator. 42 U.S.C. § 1857c-5. It is not clear, however, whether the authority to adopt such a "plan" also encompasses the authority to issue permits. Thus, the act does not expressly authorize the states to issue permits, but at best merely implies such authorization.

However, the water act expressly authorizes the states to develop and enforce a "permit program" to achieve the standards provided in the act. 33 U.S.C. § 1342(b). The act specifically describes a "permit" as an example of a "requirement" within the meaning of section 313. *Id.* at § 1365(f)(6). When the Administrator approves a state permit program, he *must* suspend the issuance of his own permits. *Id.* at § 1342(c). Nothing in the act indicates that the Administrator, upon approval of a state program, may retain authority to issue permits to federal agencies. Thus, the act expressly contemplates the issuance of permits by the states, to the exclusion of permits issued by the Administrator. Accordingly, the water act provides a stronger basis than the air act for concluding that federal agencies must comply with state permit programs.

If the Court agrees with the EPA's view that the air and water acts are to be read harmoniously, the lack of specificity in the air act concerning the states' permit-issuing authority may prove no obstacle to the position asserted by the states under that act. However, the Court may instead conclude that the lack of such specificity in the air act reveals a congressional design that the air act—unlike the water act—does not require federal compliance with state permit programs. In the latter event, the Court must distinguish between the air and water acts on the basis of the express powers delegated to the states under each act. This strengthens our view that the acts must be read together in defining the states' authority under each act.

Additionally, the history of the air and water acts is markedly different. Section 313 of the water act succeeded section 21(a) of the 1970 amendments to the water act, which required federal agencies to comply with "applicable water quality *standards*". 84 Stat. 107, *formerly* 33 U.S.C.

§ 1171(a). (Emphasis added). The legislative history of the earlier section shows that Congress intended that it include both state and federal standards. H.R.Rep., No. 91-127, 91st Cong., 2d Sess. 19 (1970). The change from the word "standards" in section 21(a) to the word "requirements" in section 313 undermines the Administrator's argument that the words must now be read synonymously. No such similar history, however, preceded the adoption of the air act. Thus, again, the Court might use the history of the water act as a guide to the meaning of the air act, or instead as a basis for differentiating between the acts.

Finally, the air and water acts differ significantly with respect to the method by which the Administrator's approval of a state program may be judicially reviewed. The air act authorizes "citizens suits" to be filed in a federal district court against any person, including the United States, who violates an "emission standard or limitation", or an order issued by the Administrator pursuant thereto. 42 U.S.C. § 1857h-2. In the *Kentucky* case, the Sixth Circuit relied on this provision in concluding that the doctrine of sovereign immunity precludes an action against the United States to require federal agencies to obtain permits from the states. 497 F.2d at 1175-76. However, the water act specifically authorizes an action to be filed in the appropriate Court of Appeals to review the Administrator's decision "in making any determination as to a State permit program" under the act. 33 U.S.C. § 1369(b)(1). Hence, if the Court should uphold the *Kentucky* decision on the issue of sovereign immunity, it should distinguish between the air and water acts on this issue. This factor further sustains our view that the acts must be analyzed together in order to determine the proper scope and limits of each act.

CONCLUSION

The air and water acts must be read in part, but not necessarily in whole, *in pari materia*. Judicial comparison of both acts is necessary to determine whether the acts are to be read harmoniously or disharmoniously, with respect to the obligation of federal agencies to comply with state permit programs. The many dissimilarities of the acts may induce the Court to interpret the air act in accordance with the more specific provisions found in the water act, or may instead induce the Court to distinguish between the acts. In the latter event, the Court must make proper distinctions on the basis of terminological, structural and historical differences in the acts. Otherwise, the Court might foreclose a proper interpretation of the water act by its decision in the *Kentucky* case, without seriously considering whether the acts' differences justify differing constructions of sections 118 and 313. For instance, in reviewing the *Kentucky* case, the Court might uphold the federal position that, in light of the legislative history of section 118, states are without authority to issue permits to federal agencies under that section; since the congressional history of section 313 is similar to that of section 118, the Court's decision would effectively resolve the issues in the instant case, without proper weight having been given to the many differences in the air and water acts which should lead to a different result.

Accordingly, we respectfully suggest that, if the Court does not speedily deny the EPA's petition, the instant case and the *Kentucky* case should be heard and considered at the same time, but not otherwise consolidated. In that event, the Court should grant the EPA's petition for a writ

of certiorari, and set the two cases for hearing on the same date, but at different times.

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